Sardar Mohd Roshan Khan (the sole owner trading under the name and style of Omar Khayam Enterprise) v Perwira Affin Bank Bhd (formerly known as Perwira Habib Bank Malaysia Bhd) and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(F)-28 OF 2009(W) AND 02(I)-33 OF 2009(W)
ZAKI AZMI CHIEF JUSTICE, RICHARD MALANJUM CJ (SABAH AND SARAWAK) AND JAMES FOONG FCJ
27 JANUARY 2010

Bankruptcy — Adjudication order — Annulment — Application for — Power of court to annul bankruptcy — Whether such power discretionary in nature — Discretion of court, how exercised — Bankruptcy Act 1967 s 105

Bankruptcy — Adjudication order — Annulment — Effect of annulment — Whether annulment wiped out bankruptcy altogether — Whether bankrupt put in position as if there had been no adjudication — Whether annulment retrospective in nature

Words and Phrases — 'annul' — Bankruptcy Act 1967 s 105

The appellant filed a civil suit on 4 March 1999 against the respondent. However, on 27 March 2003, he was adjudicated a bankrupt. The appellant subsequently settled his debts with his creditors and applied to the High Court to annul his bankruptcy. On 19 October 2006, his bankruptcy was annulled by the High Court on the ground that he had settled his debts in full. The appellant obtained judgment in the civil suit on 27 July 2007. The respondent applied to the High Court to set aside the judgment but its application was dismissed with costs. The respondent thereafter filed two appeals to the Court of Appeal, concerning, respectively, the High Court's refusal to set aside its judgment; and the High Court's findings in the civil suit. The Court of Appeal, allowed the respondent's appeals on the basis that the appellant's actions in pursuing his civil proceedings in the High Court during his bankruptcy without the previous sanction of the official assignee were null and void thereby vitiating the judgment. The appellant appealed to the Federal Court. The issue before the Federal Court concerned the effect of the annulment of the appellant's bankruptcy; ie whether the judgment obtained in the civil suit was enforceable in view of the annulment.

Held, allowing the appeals with costs:

(1) Granting an order for annulment is discretionary in nature. The court

has to consider all the facts and circumstances before deciding whether to grant an order annulling the adjudication order. The court should also note all implications that might occur before exercising such discretion. The court has to be satisfied of the facts disclosed in the affidavit supporting the bankrupt's application to annul his bankruptcy. If there are any objections to the application for an annulment, the objections should be made at the stage of appeal or at the application for annulment. Judges should be wary when considering applications for annulment since an order for annulment has far reaching consequences (see paras 35 & 38).

(2) Section 105 of the Bankruptcy Act 1967 is to be strictly construed. It is not for the courts to say why the legislators deemed it fit to enact such a provision. It is for the courts only to interpret it (see para 36).

(3) Once a bankruptcy is annulled, the annulment wipes out the bankruptcy altogether, and puts the bankrupt in the same position as if there had been no adjudication (see para 37); *Re Keet* [1905] 2 KB 666 followed.

(4) The word 'annul' means 'to declare invalid' or 'to cancel' and/or 'abolish' (see para 38).

(5) In the instant case, the effect of the annulment was as if the appellant was never a bankrupt. The issue of whether the appellant ought to be granted the order of annulment was not for the Federal Court to say in the instant appeal (see para 39).

(6) The Court of Appeal did not make any finding on the appeal in respect of the High Court's findings in the civil suit since the appellant had no locus standi without the sanction from the official assignee. Thus, this case ought to be remitted to the Court of Appeal for the same coram to hear and decide on the substantive issues of the appeal based on the principles as determined that the annulment of the appellant's bankruptcy acted retrospectively (see para 41).

[Bahasa Malaysia summary

Perayu telah memfailkan satu guaman sivil pada 4 Mac 1999 terhadap responden. Walau bagaimanapun, pada 27 Mac 2003, dia telah dijadikan seorang bankrap. Perayu kemudiannya menyelesaikan hutang-hutangnya dengan pemiutang-pemiutang dan memohon ke Mahkamah Tinggi untuk membatalkan kebankrapannya. Pada 19 Oktober 2006, kebankrapannya telah dibatalkan oleh Mahkamah Tinggi atas alasan bahawa dia telah menyelesaikan hutang-hutangnya sepenuhnya. Perayu memperoleh penghakiman dalam guaman sivil pada 27 Julai 2007. Responden memohon ke Mahkamah Tinggi untuk mengetepikan penghakiman tetapi permohonan tersebut telah ditolak dengan kos. Responden kemudiannya memfailkan dua

A rayuan ke Mahkamah Rayuan, masing-masingnya berkaitan dengan, penolakan Mahkamah Tinggi untuk mengetepikan penghakimannya; dan keputusan-keputusan Mahkamah Tinggi dalam guaman sivil tersebut. Mahkamah Rayuan membenarkan rayuan-rayuan responden atas dasar bahawa tindakan-tindakan perayu dalam meneruskan prosiding-prosiding di B Mahkamah Tinggi semasa kebankrapannya tanpa sanksi oleh pegawai pemegang harta adalah batal dan tidak sah dan dengan itu menjadikan penghakiman tersebut tidak sah. Perayu telah merayu ke Mahkamah Persekutuan. Isu di Mahkamah Persekutuan adalah berkaitan kesan pembatalan kebankrapan perayu; iaitu sama ada penghakiman yang C diperolehi dalam guaman sivil tersebut berkuat kuasa berdasarkan pembatalan tersebut.

Diputuskan, membenarkan rayuan-rayuan dengan kos:

D (1) Pemberian satu perintah untuk pembatalan adalah bersifat budi bicara. Mahkamah hendaklah mempertimbangkan kesemua fakta dan keadaan sebelum memutuskan sama ada untuk memberikan satu perintah untuk membatalkan perintah penghukuman tersebut. Mahkamah juga hendaklah mencatatkan semua implikasi yang mungkin terjadi sebelum E melaksanakan budi bicara sedemikian. Mahkamah hendaklah berpuas hati dengan fakta-fakta yang dikemukakan dalam afidavit yang menyokong permohonan si bankrap untuk membatalkan kebankrapannya. Jika terdapat apa-apa bantahan terhadap permohonan untuk satu pembatalan, bantahan-bantahan itu hendaklah dibuat F semasa peringkat rayuan atau permohonan pembatalan. Hakim-hakim hendaklah berwaspada apabila mempertimbangkan permohonan-permohonan untuk pembatalan memandangkan satu perintah untuk pembatalan mempunyai akibat yang meluas (lihat perenggan 35 & 38). G

(2) Seksyen 105 Akta Kebankrapan 1967 harus ditafsirkan dengan ketat. Ia bukan untuk mahkamah untuk mengatakan mengapa penggubal undang-undang berasa ia sesuai untuk menggubal peruntukan tersebut. Ia hanyalah untuk mahkamah mentafsirkannya (lihat perenggan 36). H

(3) Setelah satu kebankrapan dibatalkan, pembatalan tersebut sekaligus menghapuskan kebankrapan tersebut dan meletakkan si bankrap di posisi yang sama seperti tiada sebarang penghukuman (lihat perenggan 37); *Re Keet* [1905] 2 KB 666 diikut. I

(4) Perkataan 'annul' bermaksud 'to declare invalid' atau 'to cancel' dan/atau 'abolish' (lihat perenggan 38).

(5) Dalam kes ini, kesan pembatalan tersebut adalah seperti perayu tidak pernah bankrap. Isu sama ada perayu sepatutnya diberikan perintah

untuk pembatalan bukanlah untuk dibicarakan oleh Mahkamah Persekutuan dalam rayuan ini (lihat perenggan 39).

(6) Mahkamah Rayuan tidak membuat sebarang keputusan dalam rayuan ini berkaitan dengan keputusan Mahkamah Tinggi dalam guaman sivil memandangkan perayu tidak mempunyai locus standi tanpa sanksi daripada pegawai pemegang harta. Oleh itu, kes ini sepatutnya diremit ke Mahkamah Rayuan dalam coram yang sama untuk mendengar dan memutuskan isu-isu yang substantif berdasarkan prinsip-prinsip yang telah ditentukan bahawa pembatalan kebankrapan perayu bertindak secara retrospektif (lihat perenggan 41).]

[*Editorial note*:

The appellant filed this civil suit before he was adjudged a bankrupt and obtained judgment after his bankruptcy had been annulled. However, the trial of the civil suit did indeed take place during the appellant's bankruptcy period.]

Notes

For cases on annulment, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2312–2323.

Cases referred to

Bailey v Johnson (1872) LR 7 Exch 263 (refd)

Chin Kon Nam & Anor v Chai Yun Phin Development Sdn Bhd [1996] 4 MLJ 271, HC (refd)

DPP v Ashley [1995] Crim LR 565 (refd)

Dato' Hj Mohd Muslim bin Othman v Shuaib bin Lazim & Anor [1993] 2 CLJ 177 (refd)

Hester, Re (1889) 22 QBD 632 (refd)

Keet, Re [1905] 2 KB 666, CA (folld)

Kwong Yik Bank Bhd v Hah Chiew Yin Yin [1985] 2 MLJ 452, FC (refd)

Mohamad Hanifa Mohamed Yusoof (acting as Presiden Kongres Indian Muslim Malaysia (KIMMA)) v Sikandar Batcha bin Abdul Majeed [2002] 3 MLJ 164, HC (refd)

More v More [1962] Ch 424, Ch D (refd)

Theissbacher v MacGregor Garrick and Co [1993] 2 Qd R 223, CA (refd)

Weldon v Queensland Building Services Authority [2008] CCT QR 121–07 (refd)

Legislation referred to

Bankruptcy Act 1869 [UK] s 81

Bankruptcy Act 1883 [UK] s 35, 35(2)

Bankruptcy Act 1967 ss 38, 105, 105(1), (2)

Appeal from: Civil Appeal Nos W-02–722 of 2007 and W-02–586 of 2008 (Court of Appeal, Putrajaya)

Bastian Vendargon (George Proctor with him) (YS Woon and Proctor) for the applicant/respondent.

Ben Chan (Caryn Wong with him) (Mah-Kamariyah & Philip Koh) for the respondent/appellant.

Zaki Azmi Chief Justice:

INTRODUCTION

[1] These appeals are about a business man who became a bankrupt and while he was a bankrupt, he obtained a judgment against a bank. Subsequently his bankruptcy was annulled by the court. A dispute now arises between him and the bank. The bank says that the judgment that he obtained was null and void and unenforceable being in breach of s 105 of the Bankruptcy Act 1967 (Act 360) ('the Act'). He, on the other hand argued that since his bankruptcy was annulled, the adjudication order was wiped out and put him in the same position as if there had been no adjudication. In other words, he can enforce that judgment he obtained against the bank while a bankrupt.

[2] There are two appeals before us, one against the judgment granted by the court on the substantial suit of negligence/breach of trust against the respondent (Civil Appeal of the Federal Court No 02(f)-28 of 2009(W)/Civil Appeal of the Court of Appeal No W-02–722 of 2007) and the second, against the respondent's application to set aside that earlier judgment on the ground that the appellant was a bankrupt when the earlier judgment was obtained (Civil Appeal of the Federal Court No 02(i)-33 of 2009(W)/Civil Appeal of the Court of Appeal No W-02–586 of 2008). These two appeals were consolidated. For the purpose of this judgment, I am referring to the facts as if there is only one appeal because the answer to the question will dispose of both appeals.

[3] The question posed before us is 'Whether an annulment of an order of bankruptcy against a person (*on the grounds he has paid his debt in full*) has the effect of validating any act done by him prior to the annulment which would otherwise be unlawful by virtue of the bankruptcy?' (Emphasis added.)

FACTS

[4] The bankrupt is the appellant in this appeal and the bank is the respondent. The appellant filed in the High Court at Kuala Lumpur on 4 March 1999 a civil suit bearing No 2–22–155 of 1999 against the respondent

to recover a sum of RM233,155 with interest on grounds of the respondent's negligence and/or breach of trust. The case was only disposed of by the High Court some eight years, ie 27 July 2007 in favour of the appellant. A

[5] In the meantime, on 27 March 2002 (three years after he filed his suit and five years before he obtained judgment), the appellant was adjudicated a bankrupt. While he was a bankrupt, he had gone back to Pakistan. But before he left, he gave a cheque for an amount of RM50,000 to the Lembaga Hasil Dalam Negeri ('LHDN') which was meant to be utilised towards paying off his income tax, amounting to RM45,898. It can be clearly seen that it is less than the cheque of RM50,000. Unfortunately this cheque was drawn by his company and not by him personally. LHDN rejected the cheque. B C

[6] After he came back from Pakistan, he discovered that he had been made a bankrupt. However, he took about six months to settle the debt with LHDN and his other creditors and on 19 October 2006 pursuant to an application made by him, his bankruptcy was annulled by the High Court on the ground that he had settled his debt in full. D

[7] The issue before this court is whether by virtue of his bankruptcy being annulled, the judgment that he obtained against the bank is unenforceable. E

[8] The appellant relied his case on *Re Keet* [1905] 2 KB 666 at pp 673–675 (*Re Keet* will be discussed later in this judgment) where Sterling LJ discussed this issue and said the effect of an annulment is to 'wipe out the bankruptcy altogether, and put the bankrupt in the same position as if there had been no adjudication'. F

[9] I am aware that judgment in this appeal will have a wide application bearing in mind that *Re Keet* had been followed by our courts for many years. At the same time, we have to be extra cautious in considering the implication this would have for future cases. G

[10] The appellant sought to distinguish an annulment from a discharge of his bankruptcy. H

[11] Section 38 of the Act starts with:

> Where a bankrupt has not obtained his discharge —
>
> (a) (a) the bankrupt shall be incompetent to maintain any action... without the previous sanction of the Director General of Insolvency I

[12] Note the word used in s 38 is 'discharge'. The heading to that part of the Act reads 'Undischarged Bankrupt'. The appellant has asked this court to distinguish this from an annulment and therefore asked this court to interpret that where a bankruptcy has been annulled pursuant to s 105, then s 38 cannot apply to the bankrupt while he was a bankrupt.

[13] Section 105 reads:

> Power of court to annul adjudication in certain cases:
>
> (1) Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or *where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full*, or where it appears to the court that proceedings are pending in the Republic of Singapore for the distribution of the bankrupt's estate and effects among his creditors under the bankruptcy or insolvency laws of the Republic of Singapore and that the distribution ought to take place in that country, *the court may annul the adjudication*.
>
> (2) Where an adjudication is annulled under this section, all sales and dispositions of property, and payments duly made, and all acts theretofor done by the Official Assignee, or other person acting under his authority, or by the court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the court appoints, or in default of any such appointment revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the court declares by order.
>
> (3) ...
>
> (4) ...
>
> (5) When the court annuls an adjudication under this section it shall also rescind the receiving order. (Emphasis added.)

[14] The respondent's counsel on the other hand gave three reasons for saying that although the adjudication of bankruptcy was annulled the judgment entered against the bank is invalid. Firstly, according to him, an annulment takes effect prospectively. Secondly, the annulment of the appellant's bankruptcy cannot validate the unlawful act of the appellant in not having obtained the sanction from the official assignee for him to continue with his action against the bank. Thirdly, the court should not aid an illegality.

[15] Let me view the legislations from England, Australia and Malaysia relating to annulment in bankruptcy. These three countries have in their respective bankruptcy legislations similar provisions. Australia (Queensland) and Malaysia seem to have inherited these provisions from the English

Bankruptcy Act 1883.

THE ENGLISH POSITION

[16] The provision relating to annulment was first incorporated as s 81 of the Bankruptcy Act 1869. That section read:

> Whenever an adjudication in *bankruptcy is annulled*, all sales and disposition of property and payments duly made, and all acts theretofore done, by the trustee or any person acting under his authority, or by the court, shall be valid, but the property of the debtor who was adjudged a bankrupt shall in such case vest in such person as the court may appoint r in default of such appointment revert to the bankrupt for all his estate and interest therein upon such terms and subject to such conditions, or if any, as the court may declare by order.

This provision only mentioned of 'bankruptcy is (being) annulled' but nothing is stated as to the circumstances a bankruptcy can be annulled.

[17] Cockburn CJ in *Bailey v Johnson* (1872) LR 7 Exch 263 expressed the following views regarding this provision:

> The effect of s 81 is, subject to any bona fide disposition lawfully made by the trustee prior to the annulling of the bankruptcy, and subject to any condition which the court annulling the bankruptcy may by its order impose, to remit the party whose bankruptcy is set aside to *his original position*. Here the court of bankruptcy has imposed no conditions; the general provision of this section has therefore its full effect, and *that effect is to remit the bankrupt*, at the moment the decree annulling his bankruptcy is pronounced, *to his original powers and rights in respect of his property*.

[18] Blackburn J, whilst coming to the same conclusion as Cockburn CJ, however reserved from expressing any dissent toward what the Chief Justice had said. He added:

> Without determining whether the effect of s 81 is in every case to go back to the beginning, and to place the bankrupt in the position of having always owned what is by the section to 'revert' to him — as to which I do not wish to express any dissent from what the Lord Chief Justice has said, but only to abstain from expressing an opinion.

[19] The rest of the court (Keating, Mellor, Lush, Brett and Grove JJ) concurred with the opinion of Cockburn CJ.

[20] In the subsequent Bankruptcy Act 1883, s 35 laid down this situation when a bankruptcy can be annulled. This s 35 is similarly worded with our present s 105(1) of the Act. One of them is when the debts of a bankrupt

A have been paid in full. This is the first time that the law expressly provided the situation in which a bankruptcy could be annulled.

[21] Three decades after *Bailey v Johnson*, in 1905, in *Re Keet*, Stirling J expressed the views that were to be followed by the Malaysian courts and the B Australian Queensland Court of Appeal. This is what he said:

> He is not applying for an order of discharge, but he is applying for an order of annulment under s 35, which provides that 'where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, the court may, on C application of any person interested, by order, annul the adjudication' — *that is to say, wipe out the bankruptcy altogether, and put the bankrupt in the same position as if there had been no adjudication*.

D **[22]** I have two comments to make regarding *Re Keet*.

[23] Firstly, if one were to read the whole text of the case, one would find that the impugned words that I have emphasised were only obiter. The issue that arose in that case related to whether the bankrupt's debt could be E considered to have paid in full although the majority of his debts were only settled by releases and not actually paid. The effect of an annulment was never argued or was ever relevant to the issues before the court. The grant of the annulment order was dependant upon whether his debt could be considered as having paid in full or not. Since the court decided that settlement of the F debt was by way of release rather than full payment, the court held that the bankruptcy was not eligible to be annulled.

[24] Secondly, as I had said earlier, s 35 of the 1883 Bankruptcy Act was incorporated only in 1883 and there was no similar provision in the earlier G 1869 Bankruptcy Act. Could s 35 have been incorporated in the 1883 Bankruptcy Act as a result of the comments made by Cockburn CJ in *Bailey v Johnson*? After *Re Keet*, there was another decision, *More v More* [1962] Ch 424. Even in *More v More*, there was nothing mentioned about an annulment having the effect of wiping out the bankruptcy. It is therefore wrong to cite H Stirling J's statement as an authority for saying that an annulment has the effect of wiping out the bankruptcy. It is not the ratio decidendi of the case. I have gone into the English provision because our impugned s 105(1) of the Act is similarly worded to s 35 of the English 1883 Bankruptcy Act. Section 81 of the 1869 English Bankruptcy Act (later effectively substituted by I s 35(2) of the 1883 Bankruptcy Act) is similar to our current s 105(2) of the Act.

[25] In the criminal case of *DPP v Ashley* [1995] Crim LR 565, it was decided that an annulment of the adjudication of a bankrupt on grounds that

debts had been paid in full was no defence to an indictment for bankruptcy offences, even though the annulment preceded the commencement of the criminal proceedings.

THE AUSTRALIAN, QUEENSLAND'S POSITION

[26] The Australian Queensland Court of Appeal also had to consider the issue of annulment in the case of *Theissbacher v MacGregor Garrick and Co* [1993] 2 Qd R 223. I also discovered an article published by Stuart Dutson entitled *Theissbacher v MacGregor Garrick and Co*, or, *How a 'Bankrupt' can go Scot Free* found in *Bond Law Review*, Vol 5, Issue 1, 1993, Article 6 which I find useful in preparing this judgment. The author discussed at length the said case and analysed authorities leading to it's decision. He started his article as follows:

> It recently fell upon the newly created Queensland Court of Appeal in *Theissbacher v MacGregor Garrick & Co* (unreported 6 October 1992, Appeal No 95 of 1992) to be the first appellate court to consider the effect of the annulment of a bankruptcy since 1872.
>
> The court decided by majority that the effect of annulment is that the former bankrupt is, at least in general, treated as never having been made bankrupt. Whilst sub-s 154(2) of the Bankruptcy Act preserves from invalidity acts of the trustee which would otherwise be rendered invalid by the annulment, the majority decided that it was not applicable to a trustee's failure to make an election as to whether or not to pursue an action commenced before the bankruptcy — a failure which is given legal effect by sub-s 60(3) of the Bankruptcy Act. The majority judgment in *Theissbacher* is clearly in favour of a liberal interpretation of the effect of annulment so that where a bankruptcy has been annulled sub-s 154(2) is to be construed narrowly so as to minimise the effect of the annulled bankruptcy on the erstwhile bankrupt. This approach limits the effect of sub-s 154(2) to protecting the trustee for actions taken bona fide.

[27] This Queensland's case from what I can make from the article also cited and discussed the English cases that I had mentioned above. In a joint judgment of Pincus JA and White J (in *Theissbacher*) held:

> The former bankrupt is, *in general*, treated as never having been made a bankrupt; that is the effect of the annulment.
>
> ... the appellants, being deemed never to have become bankrupt, (were) unaffected by s 60(2), which depends upon their having become bankrupt; in consequence s 60(3) does not affect them either.
>
> ... is to preserve from invalidity acts of the trustee which would otherwise be rendered invalid by the annulment. (Emphasis added.)

[28] The Queensland Court of Appeal seems to have accepted the views expressed by Stirling J in *Re Keet*. In short, the majority concluded that the annulment has full retrospective effect. The Queensland Court of Appeal in *Theissbacher* also quoted the High Court judgment in the same case that the effect of annulment upon a bankrupt was described as 'he goes scot free and is as though he had never been in court at all' (see also *Weldon v Queensland Building Services Authority* [2008] CCT QR 121–07).

THE MALAYSIAN POSITION

[29] Now I come to our own country. In Malaysia, in 1996, Kadir Sulaiman J (as he then was) in *Chin Kon Nam & Anor v Chai Yun Phin Development Sdn Bhd* [1996] 4 MLJ 271 held that the removal of the incapacity of the plaintiff by the court would not render competent the action by the plaintiff commenced during the period of his incapacity as a bankrupt, since it was commenced without the prior sanction of the official assignee, although his bankruptcy was later annulled. The learned judge did not refer to *Re Keet*.

[30] The issue as to whether an annulment acted retrospectively was also considered and discussed by Abdul Aziz Mohamad J (as he then was) in *Mohamad Hanifa Mohamed Yusoof (acting as Presiden Kongres Indian Muslim Malaysia (KIMMA)) v Sikandar Batcha bin Abdul Majeed* [2002] 3 MLJ 164. He said:

> I have no doubt that Sterling LJ's words correctly express the effect of annulment. The Federal Court adopted those words in *Kwong Yik Bank Bhd v Hah Chiew Yin Yin* [1985] 2 MLJ 452 at pp 452–453. The words could only mean that the effect of annulment is retrospective. To say of the defendant that notwithstanding the annulment, he must nonetheless be treated as disqualified by bankruptcy on 11 August 2000 from being elected President of KIMMA would be not to 'wipe out the bankruptcy altogether' and not to put him 'in the same position as if there had been no adjudication'.
>
> Furthermore, I have no doubt — as learned counsel for the plaintiff himself conceded — that if an annulment is on the first of the three grounds in sub-s (1) of s 105, that is, that the debtor 'ought not to have been adjudged bankrupt', the annulment would have retrospective effect. As I said, the effect has to be the same if an annulment, as in this case, is on the second ground of full payment of debts. If the effect is to be different, full payment of debts would not have been made an equally good ground for annulment as the first ground.

[31] In *Mohamad Hanifa*, the issue was whether a person who had been adjudicated a bankrupt could hold office in a registered society since adjudication had been annulled. If his annulment took effect retrospectively, then his prior appointment as an office bearer while he was a bankrupt

continued to be valid. In that case, the person concerned was adjudged a bankrupt on 6 December 1997. He started holding office on 11 August 2000 and his bankruptcy was subsequently annulled on 20 November 2000. The annulment was on the ground that he had paid his debt in full. The learned judge who also cited *Dato' Hj Mohd Muslim bin Othman v Shuaib bin Lazim & Anor* [1993] 2 CLJ 177 and *Chin Kon Nam & Anor v Chai Yun Phin Development Sdn Bhd* decided that once a bankruptcy was annulled, the office to which he was elected to in a registered society remained good.

[32] Both judges in *Mohamad Hanifa* and *Dato' Hj Mohd Muslim bin Othman* cited *Re Keet* to support their decision. On the other hand, Abdul Kadir Sulaiman J in *Chin Kon Nam* held otherwise but *Re Keet* was not referred to him.

[33] A much earlier decision of the Federal Court in *Kwong Yik Bank Bhd v Hah Chiew Yin Yin* [1985] 2 MLJ 452 seems to be relied upon by Abdul Aziz J in *Mohamad Hanifa*. That Federal Court decision also cited *Re Keet* for holding that the effect of the annulment is to wipe out the bankruptcy as if there had been no adjudication order. Seah FCJ, delivering the judgment of the Federal Court, said:

> The relevant part of the second limb reads 'where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full ... the court may annul the adjudication'.
>
> It is pertinent to observe that the bankrupt was not applying for an order of discharge but she was applying for an order annulling her adjudication. The effect of this is to wipe out the bankruptcy altogether and put the bankrupt in the same position as if there had been no adjudication order (per Stirling LJ *In re Keet* [1905] 2 KB 666 at p 676).
>
> It is common ground that our *Bankruptcy Act 1967* is modelled along the English Bankruptcy Act 1914 and the phrase in the second limb of *s 105(1) of our Act* is in identical terms with the words in the second limb of s 29(1) of the 1914 Act. The meaning of these words 'where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full' was considered by the English Court of Appeal in the case of *In re Keet*. Although the decision was based on s 35 of the English Bankruptcy Act 1883 it is not disputed that the section corresponded to s 29(1) of the 1914 Act. *In re Keet* it was held that to satisfy the section the 'debts' — including at least all debts which have been actually and properly proved in the bankruptcy — must have been fully paid in cash, and that the second limb is not satisfied by an unconditional release given to the bankrupt by his creditors. *Keet*'s case was followed some 57 years later by Cross J in *More v More* [1962] 1 All ER 125. We have no doubt as to the soundness of this interpretation. In construing the provisions *of the Bankruptcy Act 1967* it has to be borne in mind the observations of Fry LJ in *Re Hester* (1889) 22 QBD 632 at p 641:

> I conceive that one of the objects of this statue was, if not to put an end to, yet at least to discourage, private arrangements between a debtor and his creditors. Anyone who knows the history of the law of debtor and creditor of this country, knows that private arrangements between debtors and their creditors have often been scandalous, and that they have given opportunities for misrepresentation, for private bargains, and for undue preferences. I for one should pause long before I allowed the evils of private arrangements between a debtor and his creditors to creep into the administration of this Act ...

We would adopt every word which has fallen from the lips of the learned Lord Justice.

(The observation of Fry LJ in *Re Hester* (1889) 22 QBD 632 referred above is relevant to what I have to say later regarding discretion in annulling a bankruptcy).

[34] But then in *Kwong Yik Bank* the issue was whether the bankrupt had satisfied his debt in full for his bankruptcy to be annulled; similarly was the issue in *Re Keet*. Whether such an annulment acted retrospectively was not an issue in *Kwong Yik Bank*. So in effect only the High Court decisions that had followed *Re Keet* and held that an annulment wiped out his bankruptcy as if there had been no adjudication. Two of these decisions relate to positions of holding offices, one in a registered society and the other as a state assemblyman. The third relate to the appointment of an advocate and solicitor. In the two relating to holding of offices, the High Courts held that the annulment has a retrospective effect. The third deals with appointment of an advocate and solicitor and the decision was otherwise.

[35] Granting an order for annulment is discretionary in nature. The court will have to consider all the facts and circumstances before deciding whether to grant an order annulling the adjudication order. The court should also note all implications that might occur before exercising such discretion and make such order. The court has to be satisfied of the facts disclosed in the affidavit supporting the erstwhile bankrupt's application to annul his bankruptcy (see *Williams and Muir Hunter on Bankruptcy* (19th Ed) at p 148 and *Halsbury's Laws of England* (4th Ed) Vol 3 para 458).

CONCLUSION

[36] After having carefully and fully considered all that I have mentioned earlier, I have come to this decision. Section 105 is to be strictly construed, not only based on the wording of that section but also how the section came into being. It is not for me to say why the legislators deem it fit to enact such a provision. It is for me only to interpret it.

[37] Once the bankruptcy is annulled, on either the first or second ground, the effect of that annulment is as Stirling LJ had said in *Re Keet*:

> that is to say, wipe out the bankruptcy altogether, and put the bankrupt in the same position as if there had been no adjudication.

Or as what Pincus JA and White J in the Australian case also said 'the former bankrupt is, in general, treated as never having been made a bankrupt; that is the effect of the annulment'.

[38] 'Annul' means '1. Declare (a marriage etc) invalid. 2. Cancel, abolish' (see *Concise Oxford Dictionary* (9th Ed)). If there are any objections it should be made at the stage of appeal or the application for annulment. What happens if the bankrupt failed to disclose material facts or misrepresented those facts at the application for annulment? Perhaps judges should be wary when considering applications for annulment. They should ask relevant questions for an order for annulment has far reaching consequences. There may also be instances where creditors who become aware of any application for annulment to perhaps object to such application for annulment.

[39] For this case before me, my opinion is that the effect of the annulment to the appellant was as if he was never a bankrupt. The issue of whether the appellant should be granted the order of annulment is not for me to say in this appeal.

[40] The answer to the modified question is therefore in the positive. I therefore allow both appeals with costs.

[41] The Court of Appeal did not make any finding on the appeal in respect of Civil Appeal of the Federal Court No 02(f)-28 of 2009(W) (Civil Appeal of the Court of Appeal No W-02–722 of 2007) since the appellant has no locus standi without the sanction from the official assignee. As such, I order this case to be remitted to the Court of Appeal for the same corum to hear and decide on the substantive issues of this appeal based on the principles as determined that the annulment of the appellant's bankruptcy acts retrospectively.

[42] My learned brothers the Chief Judge of Sabah and Sarawak and James Foong Cheng Yuen FCJ have read through this judgment in draft. I have incorporated their comments for which I am grateful. They have expressed their concurrences to the final draft.

Appeals allowed with costs.

Reported by Andrew Christopher Simon